14-28

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Protecting and Promoting the Open Internet	)	GN Docket No. 14-28
	)	
	)	

COMMENTS

of the

Center for Boundless Innovation in Technology

July 18, 2014

Executive Summary

The FCC lacks legal authority to reclassify broadband Internet access services as 'telecommunications services' under the Act.

An analysis of the FCC's authority to reclassify broadband Internet access as a 'telecommunications service' properly begins with the meaning of 'telecommunications', because the term 'telecommunications service' "means the offering of *telecommunications* for a fee directly to the public." Neither the FCC nor the courts have ever applied the elements of the term 'telecommunications' to the facilities used to provide broadband Internet access. The plain language of the Act and relevant regulatory history make clear that the term 'telecommunications' refers only to transmissions that are interconnected with the public switched network, and does not apply to transmissions over broadband Internet access facilities (e.g., xDSL and cable modem).

The Act defines 'telecommunications' as a transmission comprised of four conjunctive elements:

1. It is a *transmission*, not facilities,
2. The transmission must be between or among *points specified by the user,*
3. The information must be of the *user's choosing*, and
4. The transmission must not *change the form or content* of the information sent or received.

Though plain old telephone services and dial-up Internet access services meet all of the elements of 'telecommunications', broadband Internet access services do not: (1) there are no defined points for transmissions over the broadband Internet, (2) broadband Internet access services do not limit the transmission of information to that chosen by the user; and (3) broadband Internet access services introduce changes in the form and content of the information sent and received throughout the transmission.

Even if the FCC did have legal authority to reclassify, it would likely be unable to resolve the problems of applying Title II to the broadband Internet through the exercise of its forbearance

authority. The exercise of forbearance from Title II requirements for fixed broadband Internet access service providers could be difficult for the FCC to justify after its decision denying Qwest's petition for forbearance in Phoenix, Arizona, in which the FCC concluded that forbearing from unbundling obligations on the basis of duopoly, without additional evidence of robust competition, appears inconsistent with Congress' imposition of unbundling obligations as a tool to open local telephone markets to competition in the 1996 Act.

The FCC would arguably be on stronger ground, however, with respect to forbearance from the requirements in § 251(c). The FCC's decision to analyze competition in the statutorily mandated wholesale market separate from competition in the retail market when addressing the Qwest forbearance petition was patently irrational, because the FCC has previously concluded that the public interest is served by mandatory wholesale requirements *only* when there is a lack of competition in the retail marketplace. Because wholesale obligations apply only when there is a lack of competition, the FCC's threshold decision to review wholesale competition *independently* of retail competition amounted to a conclusive presumption that there was insufficient competition *before* the FCC had even conducted its competitive analysis. A contrary conclusion would mean that the FCC could *never* forbear from the unbundling and resale requirements in § 251(c) absent a competitive wholesale market, despite the fact that the purpose of unbundling and resale requirements is to promote facilities-based competition in the retail market.

Thus, even if the FCC could not forbear from tariffing broadband Internet access services, it could still forbear from the specific unbundling and resale obligations in § 251(c), because those obligations apply only to incumbent LECs. Given that the FCC's new forbearance policy relies on the market analysis it used in the *Competitive Carrier Inquiries*, it would be reasonable for the FCC to apply the same dominance/non-dominance analysis from the *Competitive Carrier Inquiries* to forbearance from provisions that apply to only one segment of the industry. To the extent that ILECs are non-dominant in the market for fixed broadband Internet access, the FCC

would have grounds to forbear from the application of § 251(c), which is premised on the assumption that ILECs are dominant 'telecommunications carriers'.

Application of the FCC's traditional dominance/non-dominance analysis would likewise suggest that, if the FCC were unable to forbear from tariffing requirements for broadband Internet access service, only the dominant provider should be subject to tariffing filing. Given the substantial differences between the markets for telephone service and fixed broadband Internet access, that could result in the application of tariff requirements to industry players who have never before been required to file them — e.g., cable modem providers or Google Fiber — depending on the outcome of the FCC's competitive analysis.

The Communications Act of 1934 (the "Act") was adopted in an environment where there was no significant competition among telephone networks.[1] The absence of competitive alternatives raised significant concerns that the telephone monopoly would charge unreasonable rates or engage in unreasonable discrimination. Congress chose to constrain this monopoly through Title II of the Act, which requires that common carriers provide service at just and reasonable rates subject without unjust or unreasonable discrimination.

In the monopoly era, the "centerpiece" of the Title II regulatory scheme was the tariff filing requirement in § 203, which requires that common carriers file their rates with the Federal Communications Commission (FCC) and charge only the filed rate.[2] The 'filed rate doctrine' "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority."[3] Once a filed rate is approved by the governing regulatory agency, it is reasonable *per* se and cannot be challenged in court.[4]

Much of Title II and the Act's procedural and administrative provisions "are premised upon" this tariff filing requirement.[5] Once the FCC began permitting new entry into telephone markets in the late 1960s and early 1970s, however, it discovered that the costs of tariff filings outweigh their benefits in markets that are subject to competition.

The FCC's greatest challenge over the last three decades has been the adaptation of a regulatory scheme premised on anticompetitive tariff filings to competitive markets.

This challenge has been greatest with respect to the Internet. The history of Internet regulation is riddled with 'temporary' exceptions that never ended, anti-competitive arbitrage schemes, and judicial remands. The still indeterminate regulatory status of voice-over-Internet-

---

[1] Policy & Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Notice of Inquiry and Notice of Proposed Rulemaking, FCC 79-599, 77 F.C.C.2d 308 at ¶ 42 (1979).

[2] *See MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 220 (1994).

[3] *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577, 101 S.Ct. 2925, 2930, 69 L.Ed.2d 856 (1981).

[4] *See Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 19 (2d Cir. 1994).

[5] *MCI Telecommunications Corp.*, 512 U.S. at 230-31 (citing 47 U.S.C. §§ 201–228, 401-416).

protocol (VoIP) is a continuing reminder of the difficulty in regulating services that use Internet Protocol (IP) under the Title II. Attempting to reclassify broadband Internet access as a 'telecommunications service' subject to Title II would likely make an already difficult challenge significantly more difficult.

Title II defines a clear separation between plain old telephone service using the public public switched telephone network and other services, including IP-based services

There is a great deal of confusion about the meaning of the core common carriage provisions in Title II and their historical application to the Internet. After the FCC classified broadband Internet services as 'information services', some advocates began pushing a novel interpretation of Title II regulation.[6] They claim that, for the purpose of determining whether its common carriage provisions apply, the Communications Act defines a "clear separation" between 'last mile' network *facilities* (including the facilities of wireless and cable systems) and *services* that use 'last mile' network facilities.[7] They also claim that this alleged separation "has nothing to do with whether or not the network owner is a monopolist."[8]

Both claims are wrong. The notion that there is a clear separation between 'facilities' and 'services' ignores the plain language of the 1996 Act and the history of Title II regulation. Title II regulates 'service' offerings, not 'facilities', and does *not* require any separation between services and their underlying facilities. Though the FCC required telephone companies to provide unbundled access to telephone network facilities for the dial-up Internet at tariffed rates, that regulatory scheme was intended to mitigate the impact of the telephone monopoly on nascent data processing services, not create a new boundary between common carrier and non-common carrier services generally.

---

[6] *See* Candace Clement and S. Derek Turner, Reclassification Is Not a Dirty Word, Free Press (Jan. 17, 2014), available at http://www.freepress.net/blog/2014/01/17/reclassification-not-dirty-word.

[7] *See id.*

[8] *See id.*

The FCC and Congress *did* define a clear separation in *Computer II* and the 1996 Act, respectively, but that separation was not between facilities and services generally; the clear separation in Computer II and the 1996 Act is between plain old telephone *services* (POTS) using the public switched telephone network (PSTN) and other services, including IP-based services. The definitions adopted in the 1996 Act make it clear that, when determining whether a particular service is subject to common carriage obligations, the ownership and relative location of the underlying facilities within a particular network architecture is definitionally irrelevant. Rather, a particular transmission is 'telecommunications' if it is 'interconnected' with the PSTN — i.e., it is capable of communicating with all other devices that are connected to the PSTN — or facilitates the delivery of a basic PSTN service, i.e., plain old telephone service.[9]

The FCC has generally relied on this simple test without detailed analysis of the specific language in the definitional sections of the Communications Act. For example, although the FCC has refused to classify VoIP services for over a decade, it has imposed a multitude of Title II obligations on 'interconnected' VoIP services because they are interconnected with the PSTN (and thus substitutable with POTS).

Title II regulates services, not facilities

By its plain language, the Communications Act was designed to regulate integrated service offerings, typically without regard to the type of facilities used to provide such services, the ownership of such facilities, or the relative location of such facilities within a communications network or networks.

The Act generally defines the subjects of its regulation in terms of particular 'services' — e.g., 'cable service' (regulated by Title VI), 'telecommunications service' (regulated by Title II), and 'television service' (regulated by Title III) — *not* particular facilities. To the extent the Act's

---

[9] *See* Petition for Declaratory Ruling That AT&T's Phone-to-Phone Ip Telephony Servs. Are Exempt from Access Charges, Order, FCC 04-97, 19 F.C.C. Rcd. 7457 at ¶ 12 (2004) (noting that 'internetworking' conversions are still 'telecommunications').

definitions of communications services mention facilities, they generally do not distinguish between the type, ownership, or location of such facilities. For example, the definition of 'telecommunications service' applies to the offering of telecommunications for a fee 'regardless of the facilities used.'[10]

When Congress *did* define a service in terms of its relative location within a communications network, it presumptively *exempted* some types of facilities from the definition's scope. For example, the Act defines the term 'local exchange carrier' as "any person that is engaged in the provision of telephone exchange service or exchange access,"[11] which services in turn rely on local PSTN facilities (i.e., the 'last mile' of the traditional telephone network).[12] Though the facilities of mobile wireless carriers are also used to provide 'last mile' access to the public switched telephone network, the Act provides that the term 'local exchange carrier' "does *not* include a person insofar as such person is engaged in the provision of a commercial mobile service" unless the FCC finds otherwise.[13]

The essential duty of common carriers is also defined in terms of 'services' in § 201(a) of the Act: "It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication *service* upon reasonable request therefor."[14] Similarly, § 201(b) provides that "all charges, practices, classifications, and regulations for and in connection with such communication *service*, shall be just and reasonable."[15]

In sum, there is no textual support in the Act for the notion that there is a clear separation between network facilities and the services that use network facilities. The separation between

---

[10] *See* 47 USC § 153(53).

[11] *See* 47 USC § 153(32).

[12] See 47 USC §§ 153(54), 153(20).

[13] *See* 47 USC § 153(32) (emphasis added).

[14] *See* 47 U.S.C. § 201(a).

[15] *See* 47 U.S.C. § 201(b).

common carrier services and other services instead depends on whether a service is or is not interconnected with the PSTN.

The FCC generally regulates *integrated* service offerings

The FCC's actual implementation of Title II likewise does not support the notion that facilities are generally regulated separately from services.

For forty years after the 1934 Act was adopted, the FCC generally treated common carriers as offering fully integrated services directly to end users. In 1976, however, the FCC created an exception for common carriers offering certain telephone services. In the *Common Carrier Resale Order*, the FCC concluded that tariffs of monopoly wireline common carriers that restricted or prohibited resale of communications services and facilities were unjust and unreasonable under §§ 201 and 202 of the Act.[16] In effect, the FCC required monopoly common carriers offering private and public switched telephone service to offer their underlying facilities for lease (e.g., 'unbundle' them) so that other entities could use those facilities to provide their own service offerings directly to end users.[17]

The FCC recognized that requiring common carriers to offer unbundled access to their facilities "would be a departure from the tradition in the communications industry where carriers owning and operating transmission facilities generally supply a complete communications service directly to the ultimate user."[18] It found the departure was justified at that time by the need to meet an "untapped, growing need for non-voice communications" that could be satisfied in part by entities who do not own transmission facilities.[19]

---

[16] *See* Regulatory Policies Concerning Resale & Shared Use of Common Carrier Servs. & Facilities, Report and Order, FCC 76-641, 60 F.C.C.2d 261 at ¶¶ 6, 13 (1976) (*Common Carrier Resale Order*).

[17] *See id.* at ¶ 81 (1976). The *Common Carrier Resale Order* excluded MTS and WATS services, but the FCC extended the resale obligation to all public switched network services in 1980. *See* Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services, Report and Order, FCC 80-607, 83 F.C.C.2d 167 at ¶ 1 (1980).

[18] *See Common Carrier Resale Order* at ¶ 10.

[19] *See id.* at ¶ 3 (1976).

When Congress wishes to treat facilities differently than services, it knows how to do so. For example, in § 254(e), Congress referred to 'facilities' and 'services' as distinct terms for the purpose of universal service funding.[20]

Common carriage status does *not* depend on facilities ownership

Though the FCC required common carriers to depart from their traditional approach of offering common carrier services as an integrated whole by requiring them to offer their facilities for resale separately from their telephone service, the FCC did *not* limit the classification of 'common carrier' to the owners of the underlying facilities. It instead found that "an entity engaged in the resale of communications service is a common carrier, and is fully subject to the provisions of Title II of the Communications Act."[21] The FCC concluded that the "ultimate [common carrier] test is the nature of the offering to the public," and noted that, in this respect, there is no difference between resale and "traditional" common carriage.[22]

> The fact that an offeror of an interstate wire and/or radio communication service leases some or all of its facilities—rather than owning them—ought not have any regulatory significance. The public neither cares nor inquires whether the offeror owns or leases the facilities. Resellers will be offering a communications service for hire to the public just as the traditional carriers do.[23]

Mobile service providers are *not* required to separately offer their underlying facilities on a common carrier basis

Though it was uncertain as to whether a cellular resale market would develop, the the FCC extended its common carrier resale policy to commercial cellular services in 1981,[24] except

---

[20] *See In re FCC 11-161, 11-9900*, 2014 WL 2142106 (10th Cir. May 23, 2014).

[21] *See id.* at ¶ 8 (1976).

[22] *See id.* at ¶ 101 (1976).

[23] *See id.* The FCC subsequently clarified that this finding was limited to 'communications service,' and did not apply to data processing under *Computer I*. *See* Regulatory Policies Concerning Resale & Shared Use of Common Carrier Servs. & Facilities, Memorandum Opinion and Order, FCC 77-34, 62 F.C.C.2d 588 at ¶ (1977).

[24] *See* Cellular Communications Systems, Report and Order, FCC 81-161, 86 F.C.C.2d 469 at ¶ 105 (1981).

that a licensee could restrict resale by another licensee in its service area once the other licensee's buildout period had expired.[25]

Once the FCC licensed additional mobile services, however, it concluded that the cellular resale rule was no longer necessary.[26] The FCC determined that, in competitive markets, the benefits of its resale policies are generally outweighed by their costs.

> In particular, as markets become more competitive, the benefits to be attained through a resale rule generally diminish because carriers have less opportunity and incentive anticompetitively to restrict resale. At the same time, the resale rule, like all regulation, necessarily implicates costs, including administrative costs, which should not be imposed unless clearly warranted. We therefore conclude that our resale rule should be narrowly tailored to apply only to those services where, due to competitive conditions, its application will confer important benefits, and only for so long as competitive conditions continue to render application of the resale rule necessary.[27]

As a result, mobile service providers were no longer required to make their facilities available as a separate service offering.

In *Cellnet Communications, Inc. v. FCC*, the 6th Circuit Court of Appeals affirmed the FCC's decision to sunset the cellular resale requirement was lawful.[28] Cellnet, a reseller of cellular services, argued that all common carriers "must" offer "unrestricted, non-detrimental use of common carrier telecommunications services," including resale, and that a customer has a "right to use a selected service without interference from the carrier selling the service."[29] The FCC responded that "*there is no common carrier obligation to allow resale of services*," as evidenced by

---

[25] *See* Petitions for Rule Making Concerning Proposed Changes to the Comm'n's Cellular Resale Policies, Report and Order, FCC 92-206, 7 F.C.C. Rcd. 4006 at ¶ 1 (1992). The resale exception was substantively similar to the 'in-market' exception in the FCC's initial automatic roaming order.

[26] *See* Interconnection & Resale Obligations Pertaining to Commercial Mobile Radio Servs., First Report and Order, FCC 96-263, 11 F.C.C. Rcd. 18455 at ¶ 14 (1996) (*Cellular Resale Sunset Order*).

[27] *See id.* (internal citations omitted).

[28] 149 F.3d 429, 432 (6th Cir. 1998).

[29] *See Cellnet Communications, Inc. v. FCC*, 149 F.3d 429, 436 (6th Cir. 1998).

Congress's decision to presumptively exempt commercial mobile providers from the resale requirement applicable to 'local exchange carriers'.[30]

The court held that the FCC's determination that "the developing competitive market would ensure the reasonableness of [wireless] carriers' practices" under §§ 201 and 202 was in accordance with the law and was not arbitrary or capricious "in light of of Congress's directive to the FCC that it consider the competitive effect of its regulations."[31] The court noted that "[t]he FCC did not adopt its resale policy for the purpose of ensuring the availability of resale. It adopted the policy as a means to achieve competition."[32]

Though the FCC has subsequently required mobile service providers to offer automatic roaming services on a common carrier basis, roaming services are *not* resale services.

The Act clearly distinguishes between common carrier and private mobile services based on interconnection with the PSTN

The historical classification of mobile services is particularly useful in understanding how the Communications Act distinguishes between common carrier and non-common carrier services. The FCC traditionally distinguished between 'public mobile services', which were subject to common carrier regulation, and 'private land mobile services', which were not.[33] In the early 1970s, the FCC authorized some mobile services to offer 'private carrier' service, i.e., service to limited groups of third-party users on a for-profit basis, but did not subject such service to common carrier regulations.[34]

---

[30] *See id.* (emphasis added).

[31] *See id.*, 149 F.3d at 437.

[32] *See id.* at 441.

[33] *See* Implementation of Sections 3(n) & 332 of the Commc'ns Act, Second Report and Order, FCC 94-31, 9 F.C.C. Rcd. 1411 at ¶¶ 3-4 (1994) (*CMRS Forbearance Order*).

[34] *See id.* at ¶ 4 (1994) (citing Inquiry Relative to the Future Use of the Frequency Band 806–960 MHz, Docket No. 18262, Second Report and Order, 46 FCC2d 752 (1974), recon., 51 FCC2d 945 (1975), aff'd, *NARUC I*)).

In 1982, Congress added Sections 3(gg) and 332(c) to the Communications Act for the purpose of, among other things, distinguishing between private and common carrier land mobile services.[35] The FCC interpreted these provisions as confirming that the commercial sale of interconnected telephone service by mobile providers was a common carrier offering, but also concluded that the statute allowed private land mobile services to interconnect with the public switched telephone network and retain their regulatory status so long as the licensee did not profit from the provision of interconnection.[36]

The FCC's 1982 decision resulted in direct competition between private land mobile services and similar common carrier services under disparate regulatory regimes, which placed common carriers at a competitive disadvantage.[37] This problem became more urgent in 1992, when the FCC left open the question of whether the proposed PCS service would be treated as a common or private carrier service.[38]

Congress responded by revising § 332 of the Communications Act in the Omnibus Budget Reconciliation Act of 1993[39] ("1993 Budget Act") to make it clear that only mobile service providers that are interconnected with the PSTN would be treated as common carriers.[40] As a result, "[c]ommercial mobile radio services, by definition, make use of the the public switched telephone network."[41]

---

[35] *See CMRS Forbearance Order* at ¶ 5. Section 3(gg), 47 U.S.C. Sec. 153(gg), was struck by the Omnibus Budget Reconciliation Act of 1993, Pub.L. No. 103–66, Title VI, § 6002(b)(2)(B)(ii)(II), 107 Stat. 312 (1993).

[36] *See CMRS Forbearance Order* at ¶ 6.

[37] *See Id.* at ¶ 7.

[38] *See id.*

[39] Pub.L. No. 103–66, Title VI, § 6002, 107 Stat. 312 (1993).

[40] *See CMRS Forbearance Order* at ¶ 11.

[41] *See id.* at ¶ 29.

Cable operators have *never* been required to offer their underlying facilities as a separately available 'service'

Finally, as noted in the *Cable Modem Order*, the FCC has *never* required cable operators to offer their underlying facilities as a separately available service, because cable operators have not traditionally been interconnected to the PSTN.[42] The fact that cable systems wires homes with last mile facilities was not considered relevant to the question of common carriage.

Under *Computer II*, the categories of 'basic service' and 'enhanced service' were mutually exclusive

Prior to the adoption of the 1996 Act, there was no question that, under *Computer II*, the categories of 'basic service' and 'enhanced service' were mutually exclusive.

In *Computer I*, the FCC attempted to distinguish between data transmission and data processing

The FCC initiated the *Computer Inquiries* in 1966 to examine "the growing convergence of computers and communications."[43] In *Computer I*, the FCC recognized that the primary purpose of some services that employ 'computer processing' is to offer communications capabilities that are substitutable for the traditional PSTN telephone services that have traditionally been the subject of Title II regulation.[44] The FCC thus attempted to distinguish between 'communications services' and 'data processing services' provided '*via* computers' by the "type of supplemental service that was provided by the computer."[45] For example, the FCC concluded that, "[i]f the computer merely controlled the transmission of messages between two or more points, leaving the message content 'unaltered', [the FCC] denoted this supplemental service as 'message switching.'"[46]

---

[42] *See* Inquiry Concerning High-Speed Access to Internet over Cable & Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77, 17 F.C.C. Rcd. 4798 at ¶ 43 (2002) (*Cable Modem Order*).

[43] Regulatory & Policy Problems Presented by the Interdependence of Computer & Commc'n Servs. & Facilities, Notice of Inquiry, FCC 66-1004, 7 F.C.C.2d 11 at ¶ 2 (1966).

[44] *See* Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, Tentative Decision of the Commission, 28 F.C.C.2d 291 at ¶¶ 41-42 (1970).

[45] *Common Carrier Resale Order* at ¶ 20.

[46] *Id.*

The FCC declined to regulate 'data processing' services and decided that it would regulate a 'hybrid' service only if "if the data processing service was merely incidental to the message switching."[47] The FCC defined the various types of 'supplemental services' that computer resale operators could offer in conjunction with leased private lines as follows:

- Message switching (subject to Title II),
- Hybrid communications (subject to Title II),
- Hybrid data processing (*not* subject to Title II), and
- Remote access data processing (*not* subject to Title II).[48]

The FCC concluded that "the imposition of regulatory constraints over what is clearly a data processing hybrid offering, even though it contains communications elements which are an integral part of and an incidental feature thereof, would tend to inhibit flexibility in the development and dissemination of such valuable offerings and thus would be contrary to the public interest."[49] On the other hand, the FCC concluded that "hybrid services which [sic] are 'essentially communications' under the principles enunciated in [its] Tentative Decision, warrant appropriate regulatory treatment as common carrier services under the Act."[50]

At the time, the monopoly telephone network (e.g., the Bell System Companies) were also permitted to perform data processing services for themselves.[51]

---

[47] *Id.*

[48] *Id.*

[49] Regulatory & Policy Problems Presented by the Interdependence of Computer & Commc'n Servs. & Facilities, Final Decisions and Order, FCC 71-255, 28 F.C.C.2d 267 at ¶ 31 (1971).

[50] *Id.* at ¶ 32.

[51] *See id.* at ¶ 40.

In *Computer II*, the FCC found that its attempt to distinguish between basic services and enhanced services had proven 'ultimately futile'

In its Final Decision in *Computer II*, the FCC reversed course. "After three attempts to delineate a distinction between communications and data processing services and failing to arrive at any satisfactory demarcation point," the FCC concluded that "further attempts to so distinguish enhanced services would be ultimately futile, inconsistent with our statutory mandate and contrary to the public interest."[52] The FCC realized that, "over the long run, any attempt to distinguish enhanced services will not result in regulatory certainty . . . . because a definitional structure is not independent of advances in computer technology and its concomitant market applications."[53]

The FCC also noted that, because resellers who offered 'communications services' were subject to Title II regulation, but resellers who offered 'data processing' were not, the 'data processing' distinction in *Computer I* imposed an implicit requirement that resellers structure their services so as to avoid crossing a regulatory boundary that would subject them to Title II.[54] The FCC concluded that removing this barrier would create more competition for 'enhanced services' than had occurred while the barrier was in place:

> The record in this proceeding makes clear that even when the Commission's stated policies are in favor of open entry, *the very presence of Title II requirements inhibits a truly competitive, consumer responsive market.*[55]

(A contemporary example of this phenomenon is Google Fiber, which declined to provide telephone service in order to avoid the application of Title II.[56])

---

[52] Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Final Decision, FCC 80-189, 77 F.C.C.2d 384 at ¶ 107 (1980) (internal citations omitted) (*Computer II Final Decision*).

[53] *Id.*

[54] *Id.* at ¶ 109.

[55] *Id.*

[56] *See* Fred Campbell, What Google Fiber Says about Tech Policy: Fiber Rings Fit Deregulatory Hands (Aug. 7, 2012), available here: http://cbit.org/blog/2012/08/what-google-fiber-says-about-tech-policy-fiber-rings-fit-deregulatory-hands/.

The FCC concluded that "all enhanced computer services should be accorded the same regulatory treatment and that no regulatory scheme could be adopted which would rationally distinguish and classify enhanced services as either communications or data processing."[57] This conclusion led the FCC with two categories of wireline service—'basic' and 'enhanced'—and two regulatory options: (1) "subject all enhanced services to regulation, or [2] refrain from regulating them in toto."[58] The FCC chose the latter option. Going forward, only the common carrier offering of 'basic transmission services' would be regulated under Title II of the Act.[59]

"In defining the difference between basic and enhanced services," the FCC concluded that basic transmission services were "traditional common carrier communications services and that enhanced services are not. Thus, while those who provide basic services would continue to be regulated, enhanced service vendors would not be subject to rate and service provisions of Title II of the Communications Act."[60] The FCC saw no need to impose Title II obligation on 'enhanced services' "*whether or not such services employ communication facilities* in order to link the terminals of the subscribers to centralized computers."[61]

Computer II thus created a clear distinction between 'basic' services subject to common carriage regulation and 'enhanced' services: Services that placed phone calls over the PSTN would continue to be regulated under Title II and all other services would not.

---

[57] *See Computer II Final Decision* at ¶ 113 (1980).

[58] *See id.* at ¶ 114.

[59] *See id.*

[60] *See id.* at ¶ 127.

[61] *See id.* at ¶ 119 (emphasis in original).

The Modified Final Judgment prohibited the BOCs from providing 'information services' based on *competitive* concerns, not traditional principles of 'common carriage'

The *Computer II* distinction between 'basic' and 'enhanced' services is further illuminated by the terms of the Modified Final Judgement (MFJ), which was issued within two years of the Final Decision in the *Computer II* proceeding.[62] The Modified Final Judgement, which required AT&T to divest itself of the Bell Operating Companies (BOCs), permitted the BOCs to provide 'local exchange telecommunications service' — i.e., plain old telephone service using the PSTN — but prohibited them from providing interexchange telecommunications service or 'information services', which were defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information which may be conveyed via telecommunications."[63] The MFJ thus defined 'telecommunications service' as plain old telephone service using the PSTN, and 'information services' as computerized communications services that used the PSTN — i.e., the dial-up Internet.

The MFJ's decision regarding information services had nothing to with traditional principles of 'common carriage'. The fact that the BOCs were prohibited from providing dial-up Internet access services was the result of an antitrust action based on competitive concerns, not FCC common carrier policies.

---

[62] *See generally United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001, 103 S. Ct. 1240, 75 L. Ed. 2d 472 (1983) *and modified sub nom. United States v. W. Elec. Co., Inc.*, 890 F. Supp. 1 (D.D.C. 1995) *vacated*, 84 F.3d 1452 (D.C. Cir. 1996) *and amended sub nom. United States v. W. Elec. Co., Inc.*, 714 F. Supp. 1 (D.D.C. 1988) *aff'd in part, rev'd in part sub nom. United States v. W. Elec. Co.*, 900 F. 2d 283 (D.C. Cir. 1990).

[63] *United States v. American Tel. & Tel. Co.*, 552 F. Supp. at 179. The MFJ initially left it to the FCC to determine whether the BOCs could provide information services through separate corporate subsidiaries. *See People of State of Cal. v. F.C.C.*, 905 F.2d 1217, 1226 (9th Cir. 1990). The antitrust court subsequently imposed corporate separation as a condition on waving the prohibition on the provision of information services generally, but allowed the BOCs to offer voice messaging services, voice storage and retrieval, and e-mail services, which the FCC considered enhanced services. *See State of Cal. v. F.C.C.*, 905 F.2d at 1226.

The 1996 Act codified the separation between plain old telephone service and IP-based services

The 1996 Act added or modified several of the definitions in the Communications Act of 1934, including those that apply to 'telecommunications,' 'telecommunications service,' and 'information service.'

After conducting an in-depth analysis of these terms in 1998 in response to a Congressional directive, the FCC concluded that these terms merely built upon the regulatory frameworks that had been established previously:

> Congress intended the categories of 'telecommunications service' and 'information service' to be mutually exclusive, like the definitions of 'basic service' and 'enhanced service' developed in our Computer II proceeding, and the definitions of 'telecommunications' and 'information service' developed in the Modification of Final Judgment that divested the Bell Operating Companies from AT&T.[64]

Based on the statutory text supplemented by legislative history, the FCC found that Congress "intended to maintain a regime in which information service providers are not subject to regulation as common carriers merely because they provide their services 'via telecommunications.'"[65]

'Telecommunications' is a simple, transparent transmission path that is not *capable* of providing enhanced functionality

In its *Universal Service Report*, the FCC expressly rejected the notion that a service could be both a 'telecommunications service' and an 'information service' simultaneously.[66] The FCC addressed the question in response to an argument that"an information service provider transmitting information to its users over common carrier facilities such as the public switched telephone network is a 'telecommunications carrier.'"[67] The FCC concluded that, according to the

---

[64] Fed.-State Joint Bd. on Universal Serv., Report to Congress, FCC 98-67, 13 F.C.C. Rcd. 11501 at ¶ 13 (1998) (*Universal Service Report*).

[65] *Id.*

[66] *See id.* at ¶ 34.

[67] *Id.*

statutory text, the term 'telecommunications' applies only to the offering of "a simple, transparent transmission path, *without the capability* of providing enhanced functionality. By contrast, when an entity offers transmission incorporating the 'capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information,' it does *not* offer telecommunications."[68]

The FCC thus concluded that 'telecommunications' refers to the plain old telephone service capabilities offered by the PSTN and 'information services' are everything else.

The FCC assumed without analysis (or judicial review) that 'advanced services' use 'telecommunications'

Shortly after it issued its *Universal Service Report* finding that 'telecommunications' is transmission with no capability to provide more than POTS, the FCC reached the inapposite conclusion that xDSL, and 'advanced service', was also a 'telecommunications service'.[69] With respect to whether xDSL uses 'telecommunications', the FCC's analysis consisted of repeating the definition: "To the extent that an advanced service does no more than transport information of the user's choosing between or among user-specified points, without change in the form or content of the information as sent and received, it is 'telecommunication,' as defined by the Act."[70] The FCC made no attempt to quantify the extent to which advances services do not more than that or to actually apply the definition's elements to xDSL. Its conclusion was wholly conclusory.

The FCC also concluded that 'advanced services' offered by incumbent local exchange carriers were either 'telephone exchange service' or 'exchange access'[71] — a conclusion that was inconsistent with the fact that the MFJ used the terms 'local exchange' and 'interexchange' to refer

---

[68] *Id.* at ¶ 39(emphasis added).

[69] Deployment of Wireline Servs. Offering Advanced Telecommunications Capability, 13 F.C.C. Rcd. 24012 at ¶ 35 (1998) (*Advanced Services Order*).

[70] *Id.*

[71] *Id.* at ¶ 40.

to plain old telephone services provided over the PSTN, and the FCC's conclusion earlier the same year in its *Universal Service Report* that the definitional changes in the 1996 Act were intended to build on the regulatory framework in the MFJ.

The FCC's conclusory analysis in the *Advanced Services Order* was *never reviewed* on appeal. The D.C. Circuit Court of Appeals remanded the case without addressing the merits to allow the FCC to reconsider its decision based on the Supreme Court's opinion in *AT&T Corp. v. Iowa Utilities Board.*[72] In its order on remand, the FCC did not address its previous analysis regarding the classification of xDSL,[73] and the analysis was not considered in the subsequent appeal.[74]

The Cable Modem Order is consistent with traditional Title II regulation of integrated service offerings

In the *Cable Modem Order*, the FCC classified broadband Internet access offered by cable operators as an 'information service'.[75] The FCC noted its previous conclusion in the *Universal Service Report* that "Internet access service is appropriately classified as an information service, because the provider offers a single, integrated service, Internet access, to the subscriber."[76]

The FCC found that cable operators were offering a single, integrate service, and were not offering a separate 'telecommunications service' to end users — a finding that was consistent with traditional Title II regulation prior to the *Common Carrier Resale Order.*[77]

The FCC rejected the notion that cable operators must be required to offer unbundled access to their underlying communications facilities.[78] The FCC noted that, although it had required

---

[72] *See US W. Commc'ns, Inc. v. FCC*, 1999 WL 728555 (D.C. Cir. Aug. 25, 1999).

[73] *See generally* Deployment of Wireline Servs. Offering Advanced Telecommunications Capability, First Report and Order and Further Notice of Proposed Rulemaking, FCC 99-48, 14 F.C.C. Rcd. 4761 (1999).

[74]

[75] *Cable Modem Order* at ¶ 7 (2002).

[76] *Id.* at ¶ 36.

[77] *Id.* at ¶ 41.

[78] *See id.* at ¶¶ 42-44.

the owners of wireline telephone networks to offer their underlying facilities as a stand-alone service, that requirement was premised on the fact that, in the past, the telephone network was the primary, if not exclusive, means of providing information services.[79] The FCC's determination that cable operators should not be subject to a similar unbundling requirement was consistent with its sunset of the cellular resale rule once the PCS band was established.

The FCC found that, if it imposed Title II unbundling obligations on cable operators, the telephone network might again become the monopoly means of providing information services, because cable operators would stop offering such services. This finding was consistent with the FCC's previous finding that the regulatory uncertainty caused by *Computer I* was restricting the output of information services.

In sum, there was nothing new or novel in the *Cable Modem Order*. The FCC's findings and its ultimate conclusion in the *Cable Modem Order* were consistent with precedent dating back to the initial adoption of the Communications Act in 1934.

The only significant anomaly in the FCC's application of the Communications Act to the Internet was the conclusory analysis in the FCC's decision to classify xDSL as a 'telecommunications service' in the *Advanced Services Order*, an analysis that was never subjected to judicial review.

Brand X was limited to the meaning of the word 'offering' in the definition of 'telecommunications service'

In *Brand X*, the Supreme Court held that the FCC's interpretation of the word 'offering' in the *Cable Modem Order* was reasonable.[80] The parties had conceded that cable modem service is an 'information service' that uses 'telecommunications'.[81] The court thus addressed a relatively

---

[79] *See id.* at ¶ 44.

[80] *See Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 986, 125 S. Ct. 2688, 2702, 162 L. Ed. 2d 820 (2005) (*Brand X*).

[81] *See Brand X*, 545 U.S. at 987-88.

limited issue: "whether cable companies providing cable modem service are providing a 'telecommunications service' in addition to an 'information service.'"[82]

With respect to *Chevron's* first step, the Court concluded that the word 'offering' in the definition of 'telecommunications service' was ambiguous in respect to the issue presented.[83] It could be read to mean that cable operators necessarily 'offer' the underlying 'telecommunications' used in the 'information service,' or it could be "read to mean a 'stand-alone' offering of telecommunications, i.e., and offered service that, from the user's perspective, transmits messages unadulterated by computer processing" (i.e., plain old telephone service).[84] The Court rejected the notion that the Act unambiguously adopted the *Computer II* facilities unbundling requirement:

> The Act's definition of "telecommunications service" says nothing about imposing more stringent regulatory duties on facilities-based information-service providers. The definition hinges solely on whether the entity "offer[s] telecommunications for a fee directly to the public," though the Act elsewhere subjects facilities-based carriers to stricter regulation. In the *Computer II* rules, the Commission subjected facilities-based providers to common-carrier duties not because of the nature of the "offering" made by those carriers, but rather because of the concern that local telephone companies would abuse the monopoly power they possessed by virtue of the "bottleneck" local telephone facilities they owned. The differential treatment of facilities-based carriers was therefore a function not of the definitions of "enhanced-service" and "basic service," but instead of a choice by the Commission to regulate more stringently, in its discretion, certain entities that provided enhanced service.[85]

The Court thus concluded that *Computer II* facilities unbundling was based on *competitive* concerns, not principles of common carriage.

With respect to *Chevron's* second step, the Court concluded that the FCC's policy choice was reasonable, because classifying broadband Internet access service as an 'information service' would not remove plain old telephone service from Title II regulation.[86]

---

[82] *See Brand X*, 545 U.S. at 986.

[83] *See Brand X*, 545 U.S. at 989.

[84] *See id.*

[85] *Brand X*, 545 U.S. at 996.

[86] *See Brand X*, 545 U.S. at 997-98.

The FCC lacks authority to reclassify broadband Internet access as a 'telecommunications service'

Those who seek reclassification of broadband Internet access as a 'telecommunications service' rely on the Supreme Court's conclusion in *Brand X* that the meaning of the word 'offering' as used in 47 U.S.C. § 153(53) is ambiguous.[87] Because courts must defer to an agency's interpretation of an ambiguous provision so long as the interpretation is reasonable,[88] they claim reclassification is simply a matter of providing a reasonable justification for interpreting the word 'offering' in the term 'telecommunications service' as requiring the unbundling of 'telecommunications' used in the provision of an 'information service'.[89]

Reclassification proponents are overlooking a critical aspect of the Court's decision in *Brand X*: The Court *assumed*, without deciding, that broadband Internet access uses 'telecommunications' to provide consumers with Internet service, because the parties had *conceded* the point.[90] The Court's *Chevron* analysis was thus limited solely to the definition of a 'telecommunications *service*'.

An analysis of the FCC's authority to reclassify broadband Internet access as a 'telecommunications service' properly begins with the meaning of 'telecommunications', because the term 'telecommunications service' "means the offering of *telecommunications* for a fee directly to the public."[91] But, as noted above, neither the FCC nor the courts have ever applied the elements of the term 'telecommunications' to the facilities used to provide broadband Internet access.

---

[87] *See Brand X*, 545 U.S. at 989.

[88] *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 845, 104 S. Ct. 2778, 2783, 81 L. Ed. 2d 694 (1984).

[89] *See* Austin Schlick, A Third-Way Legal Framework for Addressing the Comcast Dilemma, FCC Memorandum, 2010 WL 1840579 (May 6, 2010).

[90] *See Brand X*, 545 U.S. at 988. *See also* Austin Schlick, A Third-Way Legal Framework for Addressing the Comcast Dilemma, FCC Memorandum, 2010 WL 1840579 (May 6, 2010) ("When the case was briefed at the Supreme Court, all the parties agreed with the Commission that cable modem service either is or includes an information service.").

[91] 47 U.S.C. § 153(53) (emphasis added).

'Telecommunications' is *not* used to provide information services in an all-IP network

The plain language of the Act and the regulatory history discussed above both make clear that the term 'telecommunications' refers only to transmission that is interconnected with the public switched network. The term 'telecommunications' does not apply to transmission over broadband Internet access facilities (e.g., xDSL and cable modem).

The ordinary meaning of 'telecommunications' provides no insight into the detailed statutory definition. Merriam-Webster defines telecommunication as "communication at a distance" or "technology that deals with telecommunication — usually used in plural."[92] Dictionary.com defines 'telecommunications' as "the science and technology of transmitting information, as words, sounds, or images, over great distances, in the form of electromagnetic signals, as by telegraph, telephone, radio, or television."[93] 'Television' is thus considered to be a form of 'telecommunications' in ordinary usage, but it is obviously not 'telecommunications' as that term is defined in the Communications Act, because the Act provides a separate, mutually exclusion definition for 'television service'.[94] Indeed, prior to the use of the term 'telecommunications' in the MFJ, the FCC typically used more generally term 'communications' to refer to Title II services and facilities, and 'telecommunications' was not defined by the statute until Congress enacted the 1996 Act. The definition of 'telecommunications' in 47 U.S.C. § 153(50) is clearly a term of art.

It is also unambiguous that the term 'telecommunications' does not refer to facilities or transmissions generally. The statutory definition is very specific. Section 153(50) defines 'telecommunications' as "the *transmission*, between or among points *specified by the user*, of information of the *user's choosing*, without *change in the form or content* of the information as sent

---

[92] Merriam-Webster, available at http://www.merriam-webster.com/dictionary/telecommunication.

[93] Dictionary.com, available at http://dictionary.reference.com/browse/telecommunications?s=t.

[94] *See* 47 U.S.C. § 153(56).

and received."[95] A 'telecommunications' transmission is thus comprised of four conjunctive elements:

1. It is a *transmission*, not facilities,
2. The transmission must be between or among points specified by the user,
3. The information must be of the user's choosing, and
4. The transmission must not change the form or content of the information sent or received.

A transmission delivered over the public switched telephone network meets all four elements; a transmission delivered over a broadband Internet connection does not.

The public switched telephone network is clearly 'telecommunications'

There is no question that the public switched telephone network meets the definition of 'telecommunications'.[96]

Transmission. As noted above, the FCC's Title II authority is not premised on facilities ownership — it is premised on the nature of particular transmissions. "Under the statute, the heart of 'telecommunications' is transmission."[97] For example, when analyzing whether particular facilities are interstate (subject to FCC authority) or intrastate (generally subject to state authority) for regulatory purposes, the "[t]he key issue . . . is the nature of the communications which pass through the facilities, not the physical location of the lines."[98]

Points specified by the user. The public switched telephone network traditionally used a dedicated end-to-end path, or 'circuit', for each transmission.[99] The local telephone line to a sub-

---

[95] 47 U.S.C. § 153(50).

[96] *See In re FCC 11-161, 11-9900*, 2014 WL 2142106 (10th Cir. May 23, 2014) (stating that "telephone service is quite clearly a 'telecommunications service.'"

[97] Petition for Declaratory Ruling, Memorandum Opinion and Order, FCC 04-27, 19 F.C.C. Rcd. 3307 at ¶ 9 (2004).

[98] *See People of State of Cal. v. F.C.C.*, 567 F.2d 84, 86 (D.C. Cir. 1977).

[99] *See Bell Atl. Tel. Companies v. F.C.C.*, 206 F.3d 1, 4 (D.C. Cir. 2000).

scriber's location was typically dedicated to that subscriber, and even once traffic was aggregated, each call still received dedicated capacity. Prior to the implementation of advanced signaling networks, call databases, and number portability, the first three digits of a local telephone number (the "central office code") were associated with the specific local switch serving a particular geographic area and the last four digits (the "line number") were associated with a specific phone line terminating at the customer's location.[100] As a result, a customer specified the originating and terminating points of the call when the customer dialed a telephone number.[101]

Consumers who use dial-up Internet access specify the points of the call in the same way using the public switched telephone network.[102] A consumer using a dial-up modem places a telephone call by dialing a seven-digital local number to reach an ISP server located in the same local calling area as the consumer.[103] The dial-up ISP's server then performs the function of connecting the consumer to the Internet through a backbone provider.[104]

Because dial-up ISPs were considered 'end users', the dial-up Internet call was treated as a local call that 'originated' from the consumer's modem and 'terminated' at the ISP's server. The D.C. Circuit Court of Appeals held that, for calls to dial-up ISPs, the ISP is "clearly the 'called party.'"[105] The transmission of a local call from a dial-up modem to the ISP's service was thus between known points specified by the user.

---

[100] *See* Tel. No. Portability, Notice of Proposed Rulemaking, FCC 95-284, 10 F.C.C. Rcd. 12350 at ¶¶ 8-9 (1995). All users within a local exchange connect to a single switch. *See* Internet over Cable: Defining the Future in Terms of the Past, OPP Working Paper No. 30, 1998 WL 567433 (FCC Aug. 1998).

[101] The ordinary meaning of the word 'point' is "a narrowly localized place having a precisely indicated position" or "a particular location." See Merriam-Webster, available at http://www.merriam-webster.com/dictionary/point.

[102] *See* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Inter-Carrier Comp. for Isp-Bound Traffic, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 99-38, 14 F.C.C. Rcd. 3689 at ¶ 4 (1999).

[103] *See id.* at ¶ 4 (1999). A dial-up modem sends and receives information over this local telephone circuit digitally by using audible tones that fall within the frequency range used for a voice call.

[104] *See id.*

[105] *See Bell Atl. Tel. Companies v. F.C.C.*, 206 F.3d 1, 6 (D.C. Cir. 2000).

Information of the user's choosing. Information on the telephone network was specified by the user merely by speaking. Prior to the advent of digital technology, information transmitted on the PSTN was typically generated in real-time by end users. The analog telephone network did not have the capability to record, store, or send information automatically or to broadcast information to multiple locations.

Dial-up Internet access was subject to similar limitations. An end user could not place a voice telephone call while connected to a dial-up ISP, and vice versa, because dial-up modems used the same frequencies as voice calls. To keep the line free for the receipt of phone calls, a dial-up modem was typically connected to the Internet only when an end user was actively using their Internet access service. The dial-up Internet did not offer scheduled programming or attempt to push information to end users who were not actively using their Internet connection.

No change in form or content. Finally, on the analog public switched telephone network, voice telephone calls did not change the form or content of the information sent and received. The content was typically generated by a human voice in real-time that sounded substantially the same as delivered on the other end of the call. Voice calls were eventually subject to protocol processing in the middle of the network as long distance facilities began deploying digital technologies. But, the FCC exempted such protocol conversions from the definition of 'enhanced' and 'information' services "in situations where a carrier uses the protocol conversions merely to facilitate provision of an overall basic service," i.e., to facilitate plain old telephone service.[106]

Similarly, dial-up Internet services did not alter the form or content of the traffic sent from the user to the ISP's local server — the changes in form and content occurred during transmission from the ISP's local server to other Internet servers over the backbone networks, which was considered a separate transmission from the transmission occurring between the end user and the local ISP's server.

---

[106] *See* Indep. Data Commc'ns Manufacturers Ass'n, Inc., Am. Tel. & Tel. Co., 10 F.C.C. Rcd. 13717 at ¶ 16 (1995).

The facilities used to provide broadband Internet access services are clearly not 'telecommunications'

The analysis of 'telecommunications' set forth above does not apply to transmissions over facilities that provide broadband Internet access service, because broadband Internet access services are not interconnected with the public switched telephone network. Like the FCC's conclusion regarding 'enhanced services' in *Computer II*, all "communications and data processing technologies [in broadband Internet access services] have become intertwined so thoroughly as to produce a form different from any explicitly recognized in the Communications Act."[107] Thus, unlike the dial-up Internet, there is no separable portion of the infrastructure used to provided broadband Internet access services that meets the definition of 'telecommunications'. Though dial-up Internet services inherently used 'telecommunications', it is clear that broadband Internet access services do not.

Points specified by the user. Unlike dial-up Internet access, in which the user clearly specified defined points for a transmission by dialing the number for their local ISP's server, there are no defined points for transmissions over the broadband Internet.[108] In the *Pulver Order*, the FCC noted that it has traditionally applied an 'end-to-end' analysis that looks at the physical end points of a communication to determine the jurisdictional nature of any given service.[109] Under its end-to-end analysis, the FCC considers the "'continuous path of communications,' beginning with the inception of a call to its completion, and has rejected attempts to divide communications at any intermediate points between providers."[110] Based on this end-to-end analysis, the FCC has determined that the use of broadband Internet access services cannot be correlated to specific points: It

---

[107] *See Computer II Final Decision* at ¶ 120.

[108] *See* Petition for Declaratory Ruling, Memorandum Opinion and Order, FCC 04-27, 19 F.C.C. Rcd. 3307 at ¶¶ 20-21 (2004).

[109] *Id.* at ¶ 21.

[110] *Id.*

is difficult or even impossible to determine the geographic location of the termination of communications that use broadband Internet access services.[111]

A user who types in a URL to access a webpage using a broadband Internet access service is not specifying a transmission path with any defined points. The information that is transmitted as a result of the user's entering a URL may be delivered from any number of potential servers using any number of potential routes, the locations of which are not known by the user.

Information of the user's choosing. Broadband Internet access services also do not limit the transmission of information to that chosen by the user. Broadband Internet access services are always on, information is often 'pushed' to end user devices even when they are not actively using their connection. For example, one of the ways SPDY protocol — a potential replacement for HTTP — improves latency on the broadband Internet is by allowing servers to push data to a client *before* the client asks for it — a feature that isn't contemplated by the Act's PSTN-based definition of 'telecommunications'.[112]

When a user types in a URL, an elaborate series of information transmissions typically occur without the user's knowledge, let alone choice. For example, in addition to the information associated with a URL that a user chooses to type in, a user who is web browsing often receives ads from third-party ad servers that the user (and, increasingly, the owner of the accessed webpage) did not choose. Though it appears to the user that the webpage is an integrated whole, the ads are typically received from a different server in a different location from the information associated with the URL (which itself may be served from multiple 'points'). This is an inherent feature of contextual advertising on the broadband Internet.

No change in form or content. Finally, broadband Internet access services introduce changes in the form and content of the information sent and received throughout the transmis-

---

[111] *See* Vonage Holdings Corp., Memorandum Opinion and Order, FCC 04-267, 19 F.C.C. Rcd. 22404 at ¶ 25 (2004).

[112] *See* The Chromium Projects, available at http://dev.chromium.org/spdy/spdy-whitepaper.

sion. For example, with a fiber-to-the-home connection, the transmission may begin as an electromagnetic signal that travels from the end-user's model over a copper ethernet cable until it reaches an optical network terminal within or immediately outside the home, at which point the electromagnetic signal is changed into an optical signal.[113] There was no equivalent transformation in a traditional POTS call or a dial-up Internet call to the local ISP's server.

It does not matter whether the FCC believes it would be better policy to treat broadband Internet transmissions in the same way as dial-up Internet transmissions. Though the FCC has authority to fill gaps in the statute, it cannot change its plain terms, and the definition of the term 'telecommunications' clearly does not apply to broadband Internet transmissions.

Forbearance would impose a presumption in favor of Title II regulation of the Internet

In its Universal Service Report to Congress in 1998, the FCC rejected the notion that its forbearance authority could resolve the problems caused by imposing Title II obligations on Internet service providers:

> Notwithstanding the possibility of forbearance, we are concerned that including information service providers within the "telecommunications carrier" classification would effectively impose a presumption in favor of Title II regulation of such providers. Such a presumption would be inconsistent with the deregulatory and procompetitive goals of the 1996 Act. In addition, uncertainty about whether the Commission would forbear from applying specific provisions could chill innovation.[114]

These concerns are more prescient today than in 1998.

A brief history of FCC forbearance

A brief history of the FCC's early attempts at forbearance and its exercise of its statutory forbearance authority are useful in understanding the dangers of relying on forbearance as a deregulatory strategy. The FCC's authority to forbear from Title II regulation of commercial mo-

---

[113] See

[114] *Universal Service Report* at ¶ 47.

bile services and its broad statutory authority to forbear in Section 10 of the 1996 Act were adopted in response to the FCC's *Competitive Carrier Inquiries*.

In what would ultimately become a sea change in its approach to regulating telephone markets, the FCC permitted MCI to offer a competitive private line service in 1969.[115] "By 1979, competition in the provision of long-distance service was well established, and some urged that the continuation of extensive tariff filing requirements served only to impose unnecessary costs on new entrants and to facilitate collusive pricing.[116] The FCC commenced the *Competitive Carrier Inquiries* to address the matter and ultimately concluded that competition obviates the need for tariff filings "[b]ecause non-dominant carriers lacked market power to control prices and were presumptively unlikely to discriminate unreasonably."[117]

In its First Report and Order in the *Competitive Carrier Inquiries*, the FCC concluded that, in competitive markets, tariff filing *promotes* strategic behavior and *inhibits* innovation. In addition to the costs that the act of tariffing filing itself imposes, the FCC's experience showed that the efforts of competitive carriers to implement innovative services and pricing were being impeded by strategic petitions to reject or suspend their tariff filings.

> These petitions usually are filed by carriers offering comparable or competitive services. Indeed, the records of our Common Carrier Bureau reveal that approximately three-quarters of the petitions to suspend or reject filings of OCCs came from competing carriers, and not customers.[118]

The FCC found that competitive carriers "appear to have channeled considerable efforts toward delaying each other's attempts to implement price and service innovation rather than attempting primarily to improve upon their own performance in the marketplace."[119] (Netflix's claim that col-

---

[115] *See* Applications of Microwave Communications, Inc., Decision, FCC 69-870, 18 F.C.C.2d 953 (1969).

[116] *See MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 220, 114 S. Ct. 2223, 2226, 129 L. Ed. 2d 182 (1994).

[117] See

[118] Policy & Rules Concerning Rates for Competitive Common Carrier Servs. & Facilities Authorizations Therefor, First Report and Order, 77 F.C.C.2d 308 at ¶ 9 (1979).

[119] *Id.* at ¶ 30 (1979).

location is a net neutrality issues is a contemporary example of the ways in which companies attempt to use the regulatory process to lower their own costs or gain competitive advantages in the marketplace.)

The FCC's solution to this problem was to eliminate tariff filing requirements for 'non-dominant' carriers, i.e., carriers that lacked market power, because their rates could be presumed lawful.[120] The FCC initially relaxed the tariff filing requirements for non-dominant carriers, but within a few years, it eliminating the tariff filing requirement entirely for non-dominant carriers through a policy of permissive detariffing. Then, in 1985, the FCC moved to a mandatory detariffing policy in which non-dominant carriers were *prohibited* from filing tariffs — a policy that was, rather ironically, challenged by the initial competitive entrant, MCI.

In *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, the Supreme Court struck down the FCC's mandatory detariffing policy as inconsistent with the fundamental statutory scheme.[121] The Court expressed sympathy for the view that tariff filings raise artificial barriers to entry and facilitate price collusion, but concluded that the FCC's estimations of desirable policy cannot alter the meaning of the Communications Act — "'such considerations address themselves to Congress, not to the courts.'"[122]

Congress accepted the Court's invitation in the 1996 Act, which granted the FCC express forbearance authority from all Title II provisions for all common carriers. Though the FCC's forbearance authority is broad according to its plain language, recent FCC decisions have curtailed the agency's ability to exercise that authority broadly.

---

[120] *See id.*

[121] 512 U.S. 218, 114 S. Ct. 2223, 129 L. Ed. 2d 182 (1994).

[122] *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. at 234 (quoting *Armour Packing Co. v. United States*, 209 U.S. 56, 82, 28 S. Ct. 428, 435, 52 L. Ed. 681 (1908)).

FCC forbearance from Title II regulation of commercial mobile services

When Congress amended § 332 in the 1993 Budget Act to clarify that common carriage treatment of mobile service providers depends on interconnection with the PSTN, Congress also authorized the FCC to forbear from applying the provisions of Title II, with the exception of §§ 201, 202, and 208, if:

- enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;
- enforcement of such provision is not necessary for the protection of consumers; and
- specifying such provision is consistent with the public interest.[123]

As part of its evaluation of the third prong of this forbearance test, § 332(c)(1(C) requires the FCC to consider "whether the proposed regulation ... will promote competitive market conditions, including the extent to which such regulation ... will enhance competition among providers of commercial mobile service...."

The FCC first exercised this forbearance authority in 1994, when it decided to forbear from the tariffing requirements in § 203, 204, and 204 of the Act.[124] After reviewing competitive conditions in the mobile marketplace, the FCC concluded that the record did not support a finding that cellular services were "fully competitive."[125] The FCC nevertheless found that there was sufficient competition to justify forbearance from tariffing requirements because (1) there was some competition, (2) the continued applicability of §§ 201, 202, and 208 would be sufficient to protect consumers in the event there was a market failure, and (3) tariffing imposes costs that can themselves be a barrier to competition.[126]

---

[123] 47 U.S.C. § 332(c).

[124] *See CMRS Forbearance Order* at ¶ 174.

[125] *See id.* at ¶ 138.

[126] *See id.* at ¶ 175.

The FCC found that, "in a competitive market, market forces are generally sufficient to ensure the lawfulness of rate levels, rate structures, and terms and conditions of service set by carriers who lack market power," and that "removing or reducing regulatory requirements also tends to encourage market entry and lower costs."[127] With respect to tariffs, the FCC determined that, in a competitive *environment* (i.e., even in an imperfectly competitive market), requiring (or merely permitting) tariff filings can: (1) take away carriers' ability to make rapid, efficient responses to changes in demand and cost, and remove incentives for carriers to introduce new offerings; (2) impede and remove incentives for competitive price discounting, since all price changes are public, which can therefore be quickly matched by competitors; (3) impose costs on carriers that attempt to make new offerings; (4) simplify tacit collusion as compared to when rates are individually negotiated; and (5) impose administrative costs.[128]

Section 332 also preempts state regulation of entry or rates charged by commercial mobile service providers unless a state demonstrates that "market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory."[129] In interpreting this provision, the FCC concluded that a state "must do more than merely show that market conditions for cellular service have been less than fully competitive in the past,"[130] and that the existence of a duopoly market structure was insufficient to demonstrate unjust and unreasonable, or unreasonably discriminatory, rates."[131] The Commission noted that "[a]lmost all markets are imperfectly competitive, and such conditions can produce good results for consumers."[132] The FCC instead requires evidence and analysis

---

[127] *See id.* at ¶ 173.

[128] *See id.* at ¶¶ 177-78.

[129] 47 U.S.C. § 332(c)(3).

[130] Petition of Arizona Corp. Comm'n, to Extend State Auth. over Rate & Entry Regulation of All Commercial Mobile Radio Servs., Report and Order and Order on Reconsideration, FCC 95-190, 10 F.C.C. Rcd. 7824 at ¶ 8 (1995) (*Arizona Petition*).

[131] *Id.* at ¶ 20.

[132] *id.* at ¶ 18.

of "instances of systematic unjust and unreasonable rates" or a "pattern of such rates" that demonstrates the inability of the commercial mobile radio service marketplace in the state to produce reasonable rates through competitive forces.[133]

FCC forbearance under Section 10 of the 1996 Act

After the Supreme Court ruled in 1994 that the FCC lacked authority to prohibit tariffing filings for wireline telephone carriers, Congress adopted the broader forbearance authority in 47 U.S.C. § 160, which *requires* the FCC to forbear from applying any Title II regulation in any or some geographic markets, if the FCC finds that the three elements for forbearance are met (they are substantive the same as the elements for forbearance under § 332(c)(1)(A) set forth above). Like § 332, the FCC's analysis of the third prong requires it to "consider whether forbearance ... will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services."[134]

The FCC initially implemented a forward-looking approach to analyzing competition for the purpose of forbearance under § 160 that was similar to its approach under § 332. For example, in its *Triennial Review* proceeding, the FCC forbore from requiring the unbundling of certain fiber facilities in part based on the availability of intermodal competition from cable modem providers,[135] and later extended this forbearance to the separate unbundling requirements in § 271.[136] In granting forbearance from § 271, the FCC relied on the fact that cable modem providers controlled a majority of all residential and small-business lines for broadband services

---

[133] *id.* at ¶ 20.

[134] 47 U.S.C. § 160(b).

[135] *See* Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36, 18 F.C.C. Rcd. 16978 at ¶ 7 (2003).

[136] Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), 19 F.C.C. Rcd. 21496 (2004).

and the expectation of additional intermodal competition from fixed wireless, satellite, and broadband over powerline.[137]

On appeal of the *§ 271 Forbearance Order*, Earthlink argued that § 160 requires the FCC to undertake a "painstaking analysis of market conditions" in "particular geographic markets and for specific telecommunications services" before granting forbearance.[138] The D.C. Circuit Court of Appeals disagreed, concluding that "the statute imposes no particular mode of market analysis or level of geographic rigor," and that it was reasonable for the FCC to vary its forbearance analysis depending on the circumstances.[139] The court also concluded that, "Given the FCC's view of the broadband market as still emerging and developing, it reasonably eschewed a more elaborate snapshot of the current market in deciding whether to forbear with respect to the fiber network elements at issue here."[140] The court found it was reasonable to balance the forward-looking benefits of increased competition and fiber deployment against the short term impacts of forbearance, and that the FCC's forward looking judgement in the *§ 271 Forbearance Order* was reasonable.[141] The court also found that forbearance was not inconsistent with FCC precedent, because FCC precedent requiring a detailed market analysis addressed dominant carrier regulation (i.e., tariffing requirements) or merger proceedings rather than unbundling.[142]

If the FCC had maintained this forward-looking approach to forbearance, it would likely have little difficulty forbearing from the regulation of broadband Internet access services if it were to reclassify such services as 'telecommunications services'. Unfortunately, the FCC recently reversed course.

---

[137] *Id.* at ¶¶ 21-23.

[138] *EarthLink, Inc. v. F.C.C.*, 462 F.3d 1, 8 (D.C. Cir. 2006).

[139] *Id.*

[140] *Id.* at 9.

[141] *Id.*

[142] *Id.*

In 2007, the FCC denied six petitions in which Verizon was seeking forbearance from dominant carrier regulations imposed on its wireline telephone services.[143] The FCC used a static competitive analysis that focused on market share and did not consider the potential for future competition.[144] On appeal, the D.C. Circuit Court of Appeals held that the FCC's decision was arbitrary and capricious because the agency had not justified the departure from its previous approach.[145]

In a 2010 order denying a Qwest petition for forbearance in Phoenix, Arizona, the FCC expressly stated that it was returning to a static competitive analysis and would no longer account for the impact of current regulations inhibiting competition or predictive judgments regarding competition in the future.[146] The FCC concluded that (1) its analytical framework required it to define separate wholesale and retail product markets (despite the fact that the Act does not require carriers to offer their underlying facilities at wholesale in competitive markets), and (2) excluded mobile wireless service from the relevant market for telephone service because Qwest had not presented studies regarding the cross-elasticity of demand between wired and wireless telephony.[147] It also concluded that "forbearing from unbundling obligations on the basis of duopoly, without additional evidence of robust competition, appears inconsistent with Congress' imposition of unbundling obligations as a tool to open local telephone markets to competition in the 1996 Act,"[148] because it is "clear that Congress wanted to enable entry [into the telephone market]

---

[143] *See* Petitions of the Verizon Tel. Companies for Forbearance Pursuant to 47 U.S.C. %4f 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence & Virginia Beach Metro. Statistical Areas, Memorandum Opinion and Order, FCC 07-212, 22 F.C.C. Rcd. 21293 at ¶ 1 (2007).

[144] *See Verizon Tel. Companies v. F.C.C.*, 570 F.3d 294, 301 (D.C. Cir. 2009).

[145] *See Verizon Tel. Companies v. F.C.C.*, 570 F.3d at 304-05. On remand, Verizon withdrew its petitions. *See* Verizon 6 Msa Forbearance Petitions Withdrawn; Proceeding Terminated, Public Notice, DA 10-1665, 25 F.C.C. Rcd. 12632 (2010)

[146] *See* Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. S 160(c) in the Phoenix, Arizona Metro. Statistical Area, Memorandum Opinion and Order, FCC 10-113, 25 F.C.C. Rcd. 8622 at ¶ 21 (2010).

[147] *See id.* at ¶¶ 46, 58-61.

[148] *See id.* at ¶ 32.

by multiple competitors through use of the incumbent LEC's network." As discussed in more detail below, these findings would render it difficult for the FCC to forbear from tariffing or unbundling requirements for fixed broadband Internet access service providers if the FCC were to reclassify them as 'telecommunications carriers'.

The Tenth Circuit Court of Appeals upheld the denial of Qwest's forbearance petition.[149] The Court acknowledged that the FCC had "engaged in some goalpost-moving," which "does not reflect an optimal mode of administrative decisionmaking."[150] But, though the court did not foreclose the possibility that shifting of the policy goalpost may be arbitrary and capricious in some circumstances, it concluded that the FCC had not acted arbitrarily and capriciously in this instance because it had given notice of its intention to shift its policy and offered a reasonable explanation for its decision.[151] With the respect to the FCC's decision that duopoly competition did not justify forbearance, the court cited the FCC's findings that its earlier predicative judgments regarding future competitive entry had proven unfounded.[152] The court concluded that, given the "well-documented" anticompetitive risks of duopoly and subsequent developments impacting the FCC's previous predicative judgments, it was reasonable for the FCC to shift policy.[153]

It is unlikely that the FCC would receive deference if it were to shift its forbearance analysis again

Given this shift in policy, it seems unlikely that the FCC would receive deference if it were to forbear from tariffing broadband Internet access service after reclassifying it as a 'telecommunications service'. That would require the courts too countenance yet another shift in the FCC's

---

[149] *See Qwest Corp. v. F.C.C.*, 689 F.3d 1214, 1216 (10th Cir. 2012).

[150] *Qwest Corp. v. F.C.C.*, 689 F.3d at 1227-28.

[151] *See id.* at 1228-29.

[152] *See id.* at 1233.

[153] *See id.* at 1233-34.

analytical approach to forbearance only a few years after the agency abandoned the approach it had applied for nearly 20 years.

The FCC would arguably be on stronger ground, however, with respect to forbearance from the requirements in § 251(c). The FCC's decision to analyze competition in the statutorily mandated wholesale market separate from competition in the retail market was patently irrational and was not directly addressed by the court on appeal. The decision was irrational because the FCC has previously concluded that the public interest is served by mandatory wholesale requirements *only* when there is a lack of competition in the retail marketplace.[154] As the FCC noted in its order sunsetting the cellular resale rule: "Neither the language of the Communications Act nor relevant precedent establishes that any restriction on resale or discrimination against resellers necessarily violates Section 201 or 202."[155] Rather, wholesale obligations apply only when there is a lack of competition.[156] As the court noted in Cellnet Communications, Inc. v. FCC, wholesale obligations do not exist for the purpose of ensuring the availability of wholesale access — wholesale obligations are a means to achieve competition.[157]

The FCC's threshold decision to review competition in the wholesale market *independently* in the *Qwest Forbearance Order* thus amounted to a conclusive presumption that there was insufficient competition before the FCC had even conducted its competitive analysis. A contrary conclusion would mean that the FCC could *never* forbear from the unbundling and resale requirements in § 251(c) absent a competitive wholesale market, despite the fact that the purpose of unbundling and resale requirements is to promote facilities-based competition in the retail market.

154

155 *Cellular Resale Sunset Order* at ¶ 14.

156 *See id.*

157 *See Cellnet Communications, Inc. v. FCC*, 149 F.3d 429, 441 (6th Cir. 1998).

Of course, given the FCC's holding that duopoly competition is insufficient to support forbearance, and the high evidentiary threshold it recently established for demonstrating inter-modal competition constrains prices, the FCC could find that there is insufficient competition in the retail market to support forbearance from tariffing for broadband Internet access services. This would not mean, however, that the FCC could not forbear from the specific unbundling obligations in § 251(c), because those obligations apply only to incumbent LECs. Given that the FCC's new forbearance policy relies on the market analysis it used in the *Competitive Carrier Inquiries*, it would be reasonable for the FCC to apply the same dominance/non-dominance analysis from the *Competitive Carrier Inquiries* to forbearance from provisions that apply to only one segment of the industry. To the extent that ILECs are non-dominant in the market for fixed broadband Internet access, the FCC would have grounds to forbear from the application of § 251(c), which is premised on the assumption that ILECs are dominant 'telecommunications carriers'.

Application of the FCC's traditional dominance/non-dominance analysis would likewise suggest that, if the FCC were unable to forbear from tariffing requirements for broadband Internet access service, only the dominant provider should be subject to tariffing filing. Given the substantial differences between the markets for telephone service and fixed broadband Internet access, that could result in the application of tariff requirements to industry players who have never before been required to file them — e.g., cable modem providers or Google Fiber — depending on the outcome of the FCC's competitive analysis.

Respectfully submitted,

CENTER FOR BOUNDLESS INNOVATION IN TECHNOLOGY

By: /s/ FBCJR

Fred B. Campbell, Jr.
Director
Center for Boundless Innovation in Technology
2714 Meander Creek Lane
Haymarket, VA 20169
703-470-4145